Public Prosecutor v Mahathir bin Muhammad

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-06B–70–12 OF 2011

B

MOHD HISHAMUDIN, AZAHAR MOHAMED AND AZIAH ALI JJCA

16 OCTOBER 2012

C

Criminal Procedure — Appeal — Appeal against acquittal — Appeal to Court of Appeal in matter originating in magistrate's court — Notice of appeal failing to state whether appeal purely on question of law or what the question of law is — Whether notice of appeal bad in law — Whether prosecution exempted from 'questions of law only' requirement — Whether appeal defective and bad in law — Courts of Judicature Act 1964 s 50(2) & (3)

D

Criminal Procedure — Appeal — Notice of appeal — Whether defective — Appeal to Court of Appeal in matter originating in magistrate's court — Appeal by prosecution against acquittal — Notice of appeal failing to state whether appeal purely on question of law or what question of law is — Whether notice of appeal bad in law — Courts of Judicature Act 1964 s 50(2) & (3)

E

F

The magistrate's court had found the respondent guilty of an offence of administering to himself a dangerous drug under s 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The High Court had allowed the respondent's appeal against the decision of the magistrate's court and had set aside the conviction and sentence. In allowing the respondent's appeal, the learned High Court judge made a finding of mixed law and fact that, at the time when the respondent was required to undergo the urine test under s 31A(1A) of the DDA, he was not yet under arrest. Dissatisfied with the decision of the High Court, the prosecution filed the present appeal. The notice of appeal did not state that the PP was appealing to the Court of Appeal purely on a question of law or what the question of law was. It was merely worded in general terms: *terhadap keputusan Yang Arif Hakim Mahkamah Tinggi Seremban*. The issues raised by the PP in the petition of appeal were either in relation to questions of fact or in relation to questions of mixed law and fact. The learned DPP relying on the Court of Appeal case of *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143 submitted that since the PP, by virtue of s 50(3) of the Courts of Judicature Act 1964 ('the CJA') is exempted from the 'leave' requirement, therefore, it should follow that he is also exempted from the 'questions of law only' requirement. The learned DPP further argued in the alternative that even if as a matter of law the PP may only appeal on a question

G

H

I

of law only, the question of law need not have to be set out in the notice of appeal: the question of law may be set out later in the petition of appeal.

Held, dismissing the appeal:

(1) Paragraph 5 of the petition stated… *telah khilaf dari segi fakta dan undang-undang* … meaning that the PP was raising both question of fact and question of law; and was not raising purely a question of law. If at all para 5 was intended to raise a pure question of law, clearly that pure question of law was vaguely and improperly worded (see para 33).

(2) In respect of criminal appeals that emanate from a magistrate's court, s 50(2)of the CJA requires both the PP and the accused person to confine the appeal to questions of law only; and it must be purely a question of law, and not a question of mixed law and fact. Section 50(3) of the CJA exempts the PP only from the 'leave' requirement: it does not exempt him from the 'questions of law only' requirement (see para 34); *Public Prosecutor v Pasupathy Kanagasaby* [2001] 2 MLJ 143 not followed.

(3) The notice of appeal itself (filed pursuant to s 50(2) of the CJA by any person including the PP) must state clearly what the pure question of law is in respect of which the appeal is made; otherwise the notice of appeal is bad in law (see para 34).

[Bahasa Malaysia summary

Mahkamah majistret telah mendapati responden bersalah terhadap kesalahan menyuntik dirinya dengan dadah berbahaya di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Mahkamah Tinggi telah membenarkan rayuan responden terhadap keputusan mahkamah majistret tersebut dan mengenepikan sabitan dan hukuman. Dalam membenarkan rayuan responden, hakim Mahkamah Tinggi yang bijaksana membuat dapatan undang-undang dan fakta bercampur bahawa, pada masa responden dikehendakki untuk menjalani ujian air kencing di bawah s 31A(1A) ADB, dia belum lagi di bawah penahanan. Tidak berpuashati dengan keputusan Mahkamah Tinggi, pihak pendakwaan memfailkan rayuan ini. Notis rayuan tidak menyatakan bahawa pihak pendakwaan merayu kepada Mahkamah Rayuan semata-mata atas persoalan undang-undang atau apakah persoalan undang-undang tersebut. Ia hanya ditulis dalam terma am: '*terhadap keputusan Yang Arif Hakim Mahkamah Tinggi Seremban*'. Isu-isu yang dibangkitkan oleh pihak pendakwaan di dalam petisyen rayuan adalah sama ada berkaitan persoalan fakta atau berkaitan persoalan undang-undang dan fakta bercampur. TPR bergantung ke atas kes Mahkamah Rayuan *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143 berhujah bahawa memandangkan pihak pendakwaan, berikutan s 50(3) Akta Mahkamah Kehakiman 1964 ('AMK') dikecualikan daripada keperluan 'leave', oleh itu, ia patut mengikuti bahawa dia juga dikecualikan daripada keperluan 'questions of law only'. TPR yang

bijaksana selanjutnya berhujah dalam alternatif bahawa walaupun sebagai perkara undang-undang pihak pendakwaan hanya boleh merayu atas persoalan undang-undang sahaja, persoalan undang-undang tidak perlu ditetapkan di dalam notis rayuan: persoalan undang-undang boleh ditetapkan kemudiannya di dalam petisyen rayuan.

Diputuskan, menolak rayuan:

(1) Perenggan 5 petisyen menyatakan … *telah khilaf dari segi fakta dan undang-undang* … bermaksud bahawa pihak pendakwaan membangkitkan kedua-dua persoalan fakta dan persoalan undang-undang; dan bukan membangkitkan semata-mata persoalan undang-undang. Jikapun perenggan 5 adalah diniatkan untuk membangkitkan persoalan undang-undang semata-mata, jelas bahawa persoalan undang-undang tersebut adalah kabur dan ditulis secara tidak betul (lihat perenggan 33).

(2) Berkaitan rayuan-rayuan jenayah yang bermula daripada mahkamah majistret, s 50(2) memerlukan kedua-dua pihak pendakwaan dan tertuduh untuk mengehadkan rayuan hanya kepada persoalan undang-undang; dan ia mesti persoalan undang-undang semata-mata, dan bukan persoalan undang-undang dan fakta bercampur. Seksyen 50(3) AMK mengecualikan pihak pendakwaan hanya daripada keperluan 'leave': ia tidak mengecualikan dia daripada keperluan 'questions of law only' (lihat perenggan 34); *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143 tidak diikut.

(3) Notis rayuan (difailkan berikutan s 50(2) AMK oleh sesiapa pun termasuk pihak pendakwaan) mestilah menyatakan dengan jelas apakah persoalan undang-undang tersebut di mana rayuan tersebut dibuat; jika tidak notis rayuan tersebut adalah tidak wajar dari segi undang-undang (lihat perenggan 34).]

Notes

For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–206.

Cases referred to

PP v Pasupathy s/o Kanagasaby [2001] 2 MLJ 143; [2001] 2 CLJ 753, CA (not folld)

Rashidah Mohammad v Mayban Finance Bhd [2003] 5 MLJ 529; [2003] 2 CLJ 542, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 50, 50(2), (2A), (3)

Dangerous Drugs Act 1952 ss 15(1)(a), 31A, (1), (1A), 37(k)

A Federal Constitution art 8

Appeal from: Criminal Appeal No 414–35 of 2011 (High Court, Seremban)

Aslinda Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

B *Hisyam Teh Poh Teik (Hanif bin Hassan with him) (Hanif Hassan & Co) for the respondent.*

Mohd Hishamudin JCA (delivering judgment of the court):

C

[1] This is an appeal by the public prosecutor against the decision of the High Court of Seremban in allowing the appeal of the respondent (Mahathir Muhammad) against the decision of the Magistrate's Court of Kuala Pilah.

D

[2] On 16 July 2012 we dismissed the public prosecutor's appeal; and we now give our grounds.

[3] On 4 November 2011 the High Court of Seremban, after hearing an E appeal by the respondent against the decision of the Magistrate's Court of Kuala Pilah, convicting and sentencing him for an offence under s 15(1)(a) of the Dangerous Drugs Act 1952 (the 'DDA'), allowed the appeal and set aside the order of the magistrate's court.

F **[4]** Earlier, on 30 March 2011, the Magistrate's Court of Kuala Pilah had found the respondent guilty of the said offence under s 15(1)(a) of the DDA, the offence of administering to himself a dangerous drug, namely, methamphetamine. The learned magistrate, accordingly, imposed a fine of RM3,500 (in default, four months of imprisonment) and two years of police G supervision.

[5] As there was no direct or circumstantial evidence that the respondent had administered the said dangerous drug to himself, in finding the respondent guilty of the charge, the learned magistrate, accepting the submission of the H DPP, relied on the presumption of limb (k) of s 37 of the DDA.

[6] Now, s 15(1)(a) of the DDA reads:

I Self administration

15 (1) Any person who:

(a) consumes, administers to himself or suffers any other person, contrary to section 14 to administer to him any dangerous drug specified in Parts III and IV of the First Schedule; or

(b) …

shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

[7] According to the charge, the alleged offence was to have been committed by the respondent at about 4pm on 13 July 2009 at the office of the Criminal Division of the Police Headquarters of the District of Kuala Pilah.

[8] In allowing the respondent's appeal and setting aside the conviction and sentence imposed by the magistrate's court, the learned High Court judge made a finding of mixed law and fact that, at the time when the respondent was required to undergo the urine test under s 31A(1A) of the DDA, he was not yet under arrest. On the basis of this finding, the learned High Court judge ruled that there was non compliance with s 31A(1A) of the DDA in that only 'an arrested person' could be asked by a police officer (not below the rank of sergeant) to provide a specimen of his urine for the purpose of an examination by a medical officer as provided for under another subsection, namely, sub-s (1) of s 31A of the DDA. The learned judge further held that since there had been non-compliance with s 31A(1A) of the DDA, therefore, the prosecution and the magistrate court could not have relied on the presumption under limb (k) of s 37 of the DDA in order to point to the guilt of the respondent.

[9] Subsection (1A) of s 31A of the DDA provides:

(1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.

[10] And limb (k) of s 37 of the DDA provides:

Presumptions

37 In all proceedings under this Act or any regulation made thereunder:

(k) if a person is charged for an offence of consuming a dangerous drug or administering a dangerous drug to himself or suffering any other person to administer a dangerous drug to him, and any dangerous drug is found in the urine of the person charged as a result of a urine test conducted under section 31A, the person shall be presumed, until the contrary is proved, to have consumed the drug or to have administered the drug to himself or to have suffered any other person to administer the drug to him in contravention of this Act or its regulations.

[11] Dissatisfied with the decision of the High Court judge, the prosecution appealed to the Court of Appeal.

[12] The notice of appeal to the Court of Appeal, as filed by the public prosecutor (the appellant), however, merely states:

> NOTIS RAYUAN
>
> ADALAH DIBERI NOTIS bahawa Pendakwa Raya Malaysia, merayu kepada Mahkamah Rayuan terhadap keputusan Yang Arif Hakim Mahkamah Tinggi Seremban, Yang Arif Dato' Zulkifli Bin Bakar yang diberikan di Mahkamah Tinggi Seremban pada 04 November 2011 yang mana Yang Arif Hakim telah membenarkan rayuan Responden serta mengenepikan sabitan dan hukuman denda RM3500.00 (gagal bayar 4 bulan penjara) serta perintah pengawasan selama 2 tahun yang diberikan oleh Majistret Mahkamah Kuala Pilah bagi pertuduhan di bawah seksyen 15(1) (a), Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah akta yang sama.

[13] At the commencement of the hearing of this appeal, we noted that the notice of appeal did not state that the public prosecutor was appealing to the Court of Appeal purely on a question of law. Indeed, the notice of appeal does not state at all what the question of law is in respect of which the public prosecutor is appealing. It is merely worded in general terms:

> terhadap keputusan Yang Arif Hakim Mahkamah Tinggi Seremban.

[14] And we further observed that the issues raised by the public prosecutor in the petition of appeal are either in relation to questions of fact or in relation to questions of mixed law and fact; and to compound the problem, the questions are not clearly framed.

[15] We, therefore, on our own motion, asked the learned deputy prosecutor (DPP), Puan Aslinda Ahmad, as to whether, in the light of s 50(2) of the Courts of Judicature Act 1964 ('the CJA'), the prosecution could appeal on issues other than on questions of law only.

[16] Section 50(2) of the CJA provides:

> (2) An appeal shall lie to the Court of Appeal, with leave of the Court of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

[17] And sub-s (2A) of the same provides: A

> (2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.

[18] Subsection (3) of the CJA, however, provides: B

> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required. C

[19] In our judgment, what the above provisions mean is that, in respect of criminal appeals that emanate from the magistrate's court:

(a) any person (other than the public prosecutor) wishing to appeal to the Court of Appeal from a decision of the High Court must obtain prior leave of the Court of Appeal; and D

(b) any person (including the public prosecutor) wishing to appeal to the Court of Appeal from a decision of the High Court must confine his appeal only to questions of law. E

[20] The rationale for limiting the appeal to questions of law only is not difficult to appreciate. The cases that emanate from the magistrate's courts are relatively less serious in nature as compared to cases dealt with by the session courts, and in most cases they involve only findings of fact. Hence, there is very minimal risk of real injustice if further appeals to the Court of Appeal should only be confined to questions of law. F

[21] The learned DPP, however, takes a different position on the 'questions of law only' issue. She submits that, by virtue of sub-s (3), the public prosecutor, unlike the accused person, is in a special position in that he may appeal on any question, be it on a question of law or on a question of fact or on a question of mixed law and fact. The learned DPP argues that since the public prosecutor is, by virtue of sub-s (3), exempted from the 'leave' requirement, therefore, it should follow that he is also exempted from the 'questions of law only' requirement. In support of her proposition, the learned DPP refers to the Court of Appeal case of *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143; [2001] 2 CLJ 753. In this case cited, Lamin Mohd Yunus PCA, in delivering the judgment of the court, said at p 149 (MLJ); p 759 (CLJ): G H I

> Now, sub-s (2) states 'An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, … but *such* appeal shall be confined to only questions of law.' (Emphasis added.) With the words 'such appeal' it must refer to the appeal 'with the leave' or requiring leave. So sub-s (2) is aimed to make provision for an appeal

requiring leave. When 'leave' is required to be applied for, it connotes that the applicant has to satisfy the court certain condition; meaning that there must be a subject matter for arguments. In sub-s (2), the applicant must show whether or not there exist questions of law. So the existence or otherwise of the questions of law is the subject matter for submission before the court. The applicant, as we have said earlier, is no other than the aggrieved accused person. On the other hand the public prosecutor needs only to file a notice of appeal and for that purpose it is expressly provided 'no leave' is required. That means there is nothing to submit before the court. With respect, we are of the view therefore that the public prosecutor is not required to show to the court that there are 'questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.'

One may ask as to what is the rationale for requiring the aggrieved accused to show the existence of 'questions of law …' while it is not so required on the part of the public prosecutor. When it is said that the public prosecutor's appeal is not confined to questions of law because he is not required to apply for leave, it means that the public prosecutor has the liberty to re-examine every aspect of the case. Before the public prosecutor decides to bring an accused person to court with a charge that he has committed a criminal offence, he must be satisfied that he has sufficient evidence against the accused to answer. Therefore when, especially the accused is acquitted at the end of the case for the prosecution, immediately it comes to mind that there must be something wrong in the case. Therefore it is only reasonable to grant the public prosecutor, being the guardian of public and state's interests, the privilege to re-examine the whole case so far presented to the court before a higher tribunal ie, by way of an appeal.

On the other hand, cases that goes on appeal under sub-s (2) are those where a conviction has been recorded and they are not involving serious criminal offences being those coming only from a magistrate's court and in most cases there will only be a finding of fact. So it is not unreasonable or unjust to confine the accused's appeal to only questions of law.

[22] Now, we pause here to state that both the learned DPP and learned counsel for the respondent submit that this court, for the purpose of the case at hand, in making its decision, is not bound by the decision of the Court of Appeal in *Pasupathy*.

[23] With respect, we are unable to agree with the decision of the Court of Appeal in *Pasupathy*. Firstly, in our view, the wordings of sub-s (3) of s 50 of the CJA are very clear. We find no ambiguity in the provision. The subsection merely states:

> … and notwithstanding subsection (2) *no leave* of the Court of Appeal is required. (Emphasis added.)

[24] Thus the subsection refers only to 'leave of the Court of Appeal'. There is no reference in sub-s (3) to the 'questions of law only' requirement.

[25] Therefore, in our judgment, the public prosecutor is only exempted from the requirement to obtain leave. And that is all. In our opinion, if sub-s (3) is intended to also exempt the public prosecutor from the 'questions of law only' requirement, then it would have said so. But, clearly, it did not. It is an illegitimate practice to read words into a statute that are not there, save in cases of manifest absurdity (see *Rashidah Mohammad v Mayban Finance Bhd* [2003] 5 MLJ 529; [2003] 2 CLJ 542). With respect, we are unable to accept the reasoning of the learned DPP that just because the public prosecutor is exempted from the 'leave' requirement it must therefore follow that the public prosecutor is also exempted from the 'questions of law only' requirement.

[26] Secondly, the interpretation as adopted by the Court of Appeal in *Pasupathy*, as rightly submitted by Encik Hisyam, learned counsel for the respondent, does not seem to be in harmony with the spirit of art 8 of the Federal Constitution that provides for equality before the law. If one were to accept the prosecution's contention, then, on the question of fact or on the question of mixed law and fact, the accused person is entitled to raise it only twice before the courts (that is, before the magistrate's court and before the High Court), whereas the public prosecutor, on the other hand, is entitled to raise it thrice before the courts (that is, before the magistrate's court, before the High Court and before the Court of Appeal). Such an interpretation, if adopted, would be discriminatory in nature: it discriminates unfairly against the accused person; particularly, bearing in mind that even as it is now the public prosecutor vis-a-vis the accused is already in an advantageous position in that he is exempted from the requirement to obtain leave in order to appeal to the Court of Appeal.

[27] Thirdly, with the greatest respect, we are not convinced by the 'rationale' as explained by the Court of Appeal in *Pasupathy*, in particular, the following part of the reasoning of the Court of Appeal (at p 759):

> Before the public prosecutor decides to bring to bring an accused person to court with a charge that he has committed a criminal offence, he must be satisfied that he has sufficient evidence against the accused to answer. Therefore when, especially the accused is acquitted at the end of the case for the prosecution, immediately it comes to mind that there must be something wrong with the case.

[28] Now, what does the Court of Appeal mean by:

> … there must be something wrong with the case.?

[29] By the above words, the Court of Appeal must have meant that there must have been 'something wrong' with the decision of the High Court whenever an accused is acquitted (or with the decisions of both the magistrate's

court and the High Court where the accused is acquitted by both the magistrate's court and the High Court). Now, if this is what the Court of Appeal meant then the Court of Appeal is implying that the decision of the High Court (or the decisions of both the magistrate's court and, on appeal, the High Court) is 'always right' had it been the other way round, that is to say, had it been a case where the accused been convicted by the High Court (or by both the magistrate's court and, on appeal, the High Court). The Court of Appeal is also implying that the public prosecutor is incapable of making any error of judgment in deciding to prosecute the accused person. With respect, we do not see the logic of the Court of Appeal's reasoning. In life, no one is infallible.

[30] The learned DPP further argues in the alternative that even if as a matter of law the public prosecutor may only appeal on a question (or questions) of law only, the question of law need not have to be set out in the notice of appeal: the question of law may be set out later in the petition of appeal. And in this regard the learned DPP further submits that para 5 of the petition of appeal does set out a 'question of law'.

[31] Now, para 5 of the petition reads:

> 5. Selanjutnya, Yang Arif Hakim telah khilaf dari segi fakta dan undang-undang apabila gagal untuk mempertimbangkan fakta bahawa kegagalan untuk mematuhi peruntukkan seksyen 31 A, Akta Dadah Berbahaya 1952 tidak memudaratkan kes pendakwaan memandangkan ianya satu peruntukkan prosedur dan satu 'empowering provision' berbanding dengan seksyen 15(1)(a) Akta Dadah Berbahaya 1952 yang merupakan peruntukkan substantive yang menjadikan ianya satu kesalahan untuk memasukkan dadah ke dalam diri sendiri.

[32] With respect, we are unable to agree with the learned DPP's submission. In our opinion, since the appeal can only be on a question of law — and it must be purely a question of law; and not a question of mixed law and fact — the pure question of law must be clearly set out in the notice of appeal itself. The question of law ought not to be withheld by the party appealing until the time come for the filing and serving the petition of appeal. It would not be fair to the respondent in the appeal; it would be prejudicial to the respondent. From the time the notice of appeal is filed and right until the time when the petition of appeal is filed, the respondent should not be left wondering as to why the public prosecutor is still insisting on pursuing the matter against him.

[33] In any case, para 5 of the petition states:

> … telah khilaf dari segi fakta dan undang-undang …

meaning that the public prosecutor is raising both question of fact and question of law; and is not raising purely a question of law. And we further

observe that if at all para 5 is intended to raise a pure question of law, clearly that pure question of law is vaguely and improperly worded.

[34] In conclusion, we hold that in respect of criminal appeals that emanate from a magistrate's court, sub-s (2) of s 50 of the CJA requires both the public prosecutor and the accused person to confine the appeal to questions of law only; and it must be purely a question of law, and not a question of mixed law and fact. We also hold that sub-s (3) of s 50 of the CJA exempts the public prosecutor only from the 'leave' requirement: it does not exempt him from the 'questions of law only' requirement. We further hold that the notice of appeal itself (filed pursuant to sub-s (2) of the CJA by any person including the public prosecutor) must state clearly what the pure question of law is in respect of which the appeal is made; otherwise the notice of appeal is bad in law.

Appeal dismissed.

Reported by Kanesh Sundrum